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No. 96-1400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF CALIFORNIA, STATE LANDS COMMISSION,

Petitioner,

—v.—

DEEP SEA RESEARCH, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether states may elude initial evidentiary hearings in attempting to establish title to shipwrecks under the Abandoned Shipwreck Act of 1987 (the "ASA")?

2. Whether admiralty courts properly apply traditional admiralty precepts in determining if a shipwreck is abandoned under the ASA?

3. Whether the courts below were correct in applying the law of salvage to the disposition of the *res*?

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BRIEF OF *AMICUS CURIAE* THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS

The American Institute of Marine Underwriters ("AIMU") hereby respectfully files this brief *amicus curiae*.[1] Written consent of all parties has been duly requested and received. Letters consenting to the filing of this brief signed by counsel for Petitioner and Respondent have been filed with the Clerk of this Court.

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[1] No counsel for any party has authored this brief in whole or in part. Only the *amicus curiae*, AIMU, and its counsel have contributed to the preparation and submission of this brief.

AIMU was founded in 1898 and is a national trade association of over ninety insurance companies, each of which is authorized to engage in the business of providing ship owners, cargo owners and other maritime interests with marine insurance in one or more states of the United States. Because its membership underwrites approximately ninety percent of the marine insurance written in the United States, the issues of this case are of extreme importance to AIMU and its member companies. The insurance provided by AIMU members is critical to the American maritime industry and central to all import and export businesses in the Nation.

AIMU's interest in this appeal stems from its efforts to maintain certainty and uniformity in maritime law throughout the United States. Particularly, the underwriters of AIMU, which typically become subrogated owners of recovered maritime property on which claims have already been paid, are concerned by the possibility that the traditional definition of "abandonment" as fashioned below by the United States Court of Appeals for the Ninth Circuit may be eroded if the rights of the owners in property lost at sea are ignored. Moreover, AIMU is interested in the uniform application of maritime laws such as the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101 *et seq.* (the "ASA"). This appeal may finally clarify the scope of the ASA and set forth the necessary procedural prerequisites with which a state must comply prior to claiming applicability of the statute and immunity from proceedings in federal court. By determining if and when the ASA applies to *in rem* proceedings regarding salvageable sunken property located within the territorial waters of the United States, AIMU can be confident that *in rem* proceedings will not be unduly forestalled by a state's premature intervention and that a court with appropriate jurisdiction will consider the issues on their merits.

SUMMARY OF ARGUMENT

In *in rem* proceedings, federal district courts must make initial determinations as to the applicability of the ASA to sunken property.[2] States seeking title to shipwrecks under the ASA's procedures cannot escape vital evidentiary hearings under the guise of immunity under the Eleventh Amendment. Owners of property lost below the sea may not be deprived of their rights in federal admiralty courts without, at the very least, a threshold determination as to the application of the ASA to the shipwreck.

It is equally true that the ASA and federal maritime law are a complete system to adjudicate ownership rights in abandoned shipwrecks and that conflicting state laws are preempted. In determining whether a shipwreck is abandoned, courts properly apply traditional admiralty law which requires clear and convincing evidence of abandonment when an owner appears in a proceeding. Because the factual determination that THE BROTHER JONATHAN has not been abandoned was proper, the courts below correctly applied federal maritime law and not the ASA to the disposition of this *res*. Treating the shipwreck as a unified *res* comports with the venerable goals of maritime salvage law of conservation and orderly administration of the wreck site.

ARGUMENT

I. STATES MAY NOT ESCAPE EVIDENTIARY HEARINGS UNDER THE ASA

The ASA, both in its express terms and in its design and purpose, requires that federal district courts make initial determinations of the applicability of the statute to ship-

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[2] The invaluable assistance of Cliona Jennings, a student at the University of Virginia School of Law, in drafting this brief *amicus curiae* is gratefully acknowledged.

wrecks. Without a threshold determination as to the application of the ASA to a particular wreck, owners of sunken property and salvors would be deprived of the opportunity to adjudicate salvage rights in federal admiralty courts even where a state can make no showing that it has a claim to the sunken property.

A. The Eleventh Amendment Is Not Implicated By The Decision Below

When a federal district court in an *in rem* proceeding determines whether a shipwreck falls within the purview of the ASA, there is no violation of the Eleventh Amendment. The ASA does not automatically vest title to certain wrecks in a state. The ASA mandates a two-step process which requires the federal government to (i) assert title over specific wrecks that meet the requirements of the ASA, and (ii) transfer title to such wrecks to a state only after the federal government has properly asserted ownership pursuant to the statute. 43 U.S.C. § 2105 (1987)[3]. An initial evidentiary hearing is necessary to determine whether the requirements of the ASA are met in order for a state to be included in the chain of title to the wreck. The Eleventh Amendment immunity of a state is not implicated by a federal district court's initial determination of whether or not a specific wreck meets the requirements of the ASA. For this reason, a state's claim of immunity from suit in federal court prior to the initial evidentiary hearing is premature and improper.

[3] 43 U.S.C. § 2105 provides in relevant part:

> (a) The United States asserts title to any abandoned shipwreck that is –
>
> (1) embedded in submerged lands of a State;
>
> (2) embedded in coralline formations protected by a State on submerged lands of a State; or
>
> (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.
>
> (b) The public shall be given adequate notice of the location of any shipwreck to which title is asserted under this section. The Secretary of the Interior, after consultation with the appropriate State Historic Preservation Officer, shall make a written determination that an abandoned shipwreck meets the criteria for eligibility for inclusion in the National Register of Historic Places under clause (a)(3).
>
> (c) The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

43 U.S.C. § 2105.

Furthermore, the ASA provides that if a wreck does not satisfy the requirements of the ASA, the federal court retains jurisdiction over the *in rem* admiralty action, and any litigation regarding ownership rights in the wreck will be determined by the traditional maritime rules of the law of salvage and, in appropriate circumstances, the law of finds. 43 U.S.C. § 2106(b)[4]. Therefore, pursuant to § 2106(b), the federal district court has a duty to determine if it has jurisdiction over the wreck, and is statutorily directed to conduct an initial analysis into whether the wreck in question falls within the ambit of the statute.

The Petitioner incorrectly argues that *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), *Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665 (7th Cir. 1992), *cert. denied sub nom., Zych v. Illinois Historic Preservation Agency*, 506 U.S. 985 (1992), and *Maritime Underwater Surveys, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F.2d 6 (1st Cir. 1983), endorse the position that the mere assertion of immunity in admiralty *in rem* cases acts as a complete bar to adjudication

[4] 43 U.S.C. § 2106 provides in relevant part:

> (a) The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies.
>
> (b) This chapter shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies.

43 U.S.C. § 2106.

in federal courts. *Treasure Salvors, Inc.* involved a suit by a salvor against state officers, regarding the custody of artifacts taken from a wreck found outside of state territorial waters well before the creation of the ASA. *Treasure Salvors, Inc.*, 458 U.S. at 670. Similarly, *Maritime Underwater Surveys* was also litigated far before the enactment of the ASA. *Maritime Underwater Surveys*, 717 F.2d at 6. Because neither case required the courts to conduct evidentiary hearings on the relevance of the ASA and Eleventh Amendment, they are not relevant here. Contrary to the Petitioner's assertions, *Zych* is completely consistent with the holding of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit" or the "court below") that an evidentiary hearing to determine the applicability of the ASA is required in federal district courts. In *Zych*, the Seventh Circuit affirmed the lower court's finding that the State of Illinois had a colorable claim to the wreck under the ASA, and dismissed all further litigation regarding the wreck from federal court ***once the threshold determination of the State's colorable claim to the wreck under the statute had been made***. The Seventh and Ninth Circuits agree: Wrecks must be assessed for their compliance with the ASA before a state may claim immunity from further litigation in federal court.

The United States District Court for the Northern District of California below properly held that the State of California had the burden of proving its colorable claim to the wreck, rather than requiring the salvor to overcome a presumption of state ownership. A party claiming the benefit and protection of immunity from suit must prove its entitlement. In analogous cases involving the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11, and the Federal Tort Claims Act, 28 U.S.C. § 1346, federal courts have held that a defendant seeking immunity from suit must first prove that he or she is entitled to it. *See ITSI TV Prods., Inc. v. Agricultural Ass'ns*, 3 F.3d 1289 (9th Cir. 1993); *Meadows v. Dominican Republic*, 817 F.2d 517 (9th Cir. 1987), *cert. denied*, 484 U.S. 976 (1987); *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992). Once the plaintiff in an *in rem* admiralty action has properly invoked the jurisdiction of the federal court pursuant to Title 28 U.S.C. § 1333, a state has the obligation to prove a lack of subject matter jurisdiction pursuant to any Eleventh Amendment immunity argument.

By preserving federal jurisdiction over an *in rem* admiralty claim until a federal court finds that the criteria of the ASA have been satisfied and that a state's property interest is vested, Congress has not abrogated a state's Eleventh Amendment immunity. "The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim. The issues are wholly distinct." *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 786 n.4 (1991). Thus, the Ninth and Sixth Circuit decisions to conduct an evidentiary hearing into the requirements of the ASA before considering the state's claim of immunity, reflect the clear legislative direction in the ASA. *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S. Ct. 1114, *cert. denied*, ___ U.S. ___, 116 S. Ct. 1415 (1996).

The question whether a state can immediately invoke the protection of Eleventh Amendment immunity has crucial implications for the future application of the ASA as well as for the marine underwriting and salvage industries. If a state is automatically immune from *in rem* proceedings in federal court, the requirements of the ASA are rendered superfluous. Federal courts would be unable to assess whether a wreck met the requirements of the ASA before being compelled to dismiss such actions for lack of subject matter jurisdiction. By creating three situations in which the United States may assert title to shipwrecks, Congress specifically intended the federal courts to determine to which wrecks the ASA applies and anticipated federal court adjudication at that early juncture in litigation. 43 U.S.C. § 2105.

By confining the application of the federal statute to particular wrecks, Congress specifically limited the scope of the ASA so as to exclude commercially viable, unabandoned

wrecks. Allowing a state to assert immunity from suit prior to any threshold finding regarding the applicability of the ASA would allow a state to assert title over wrecks which have not been abandoned. As a result, a state would be able to convert privately owned, commercially viable property. Finally, if states are allowed to invoke immunity prior to a threshold determination regarding the applicability of the ASA, salvors and owners of sunken property would be forced to litigate claims concerning the interpretation of a federal statute in state courts, which have little or no experience in maritime matters. The onus of having to litigate every salvage venture in state courts will have disastrous effects on the maritime salvage industry and will discourage the underwriting of marine risks. Perhaps more importantly, removing the requirement of an evidentiary hearing would expand the intended effect of the ASA well beyond its primary purpose of historical preservation of ancient wrecks; without the safeguard of an evidentiary hearing, a state would be able to assert a vested interest in any wreck found in state waters, no matter how recent or commercially viable. Such a result would fly in the face of the venerable traditions of federal maritime law.

B. The ASA Preempts Section 1613 Of The California Public Resources Code

California asserts an alternate theory for possession of THE BROTHER JONATHAN under section 6313 of the California Public Resource Code (1997) (the "CPRC").[5] However, the

[5] California Public Resource Code § 6313 states in relevant part:

> (a) The title to all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California is vested in the state. All abandoned shipwrecks and all submerged archaeological sites and submerged historic resources of the state shall be in the custody and subject to the control of the commission for the benefit of the people of the state of California. The commission may transfer title, custody, or control to other state agencies or recognized scientific or educational organizations, institutions, or individuals by appropriate legal conveyance.
>
> *(footnote continued)*

Court of Appeals for the Ninth Circuit properly ruled that CPRC § 6313 is preempted by the ASA because the California state statute conflicts with the federal legislation and undermines the primary goals of the ASA.

Congress' intent to preempt state law may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). However, if Congress has not made a clear statement regarding its intention to preempt state law, the state law is preempted if it actually conflicts with federal law. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983). State law also will be preempted if federal law so thoroughly occupies the legislative field "as to [have] left no room for the States to supplement it." *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

> (b) As used in this section, "submerged archaeological site" and "submerged historic resource," shall be given the broadest possible meaning, to include any submerged object, structure, building, watercraft, or vessel and any associated cargo, armament, tackle, fixture, human remains, or remnant thereof, or any site, area, person, or place, which is historically or archaeologically significant, or significant in the prehistory or history or exploration, settlement, engineering, commerce, militarism, recreation, or culture of California and which is partially or wholly embedded in or resting on state submerged or tidal lands.
>
> (c) Sites with archaeological or historic significance shall be determined by reference to their eligibility for inclusion in the National Register of Historic Places. Any submerged archaeological site or submerged historic resource remaining in state waters for more than 50 years shall be presumed to be archaeologically or historically significant. The commission, with the assistance of the State Office of Historic Preservation, shall identify, compile, and maintain an inventory of shipwreck sites of archaeological or historical significance and shall make the listing available to the public.

CPRC § 6313.

Congress has indicated its intent to preempt state law regarding the ownership of historic shipwrecks in the structure of the ASA, and § 2106 in particular. Section 2106 of the ASA states:

> (a) The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies;
>
> (b) This chapter shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies.

43 U.S.C. § 2106 (a) and (b). Through the plain language of the statute Congress has mandated that all shipwrecks, regardless of where they are found, will fall into one of two categories: those to which the ASA will be applied and those to which traditional maritime law will be applied. Congress has conceptualized two, and only two, ways courts may adjudicate the ownership rights to shipwrecks, using either the rules of the ASA or the rules of traditional maritime law. Congress has not, however, reserved or conceptualized the application of any state law to litigation regarding title to shipwrecks, because it has specifically omitted any reference to state law in § 2106.[6]

[6] In addition, California has erroneously argued that § 2105 (e) of the ASA, which reserves states' ownership rights to submerged natural resources created under 43 U.S.C. § 1311, is a clear indication of Congress' intent to allow states to assert title over wrecks through state law.

Section 2105(e) states:

> This section does not affect any right reserved by the United States or by any State (including any right reserved with respect to Indian lands) under—
>
> (1) section 1311, 1313, or 1314 of this title; or
>
> (2) section 414 or 415 of Title 33.

43 U.S.C. § 2105 (e).

California has argued that 43 U.S.C. § 1311, The Submerged Lands Act of 1953, established state title over all shipwrecks found on state submerged lands and gave the authority to the individual states to pass legislation confirming ownership of shipwrecks. However, 43 U.S.C. § 1311 establishes state title over "the natural resources within [state] lands and waters." The Submerged Lands Act of 1953 never mentions shipwrecks.

43 U.S.C. § 1311(a) states in relevant part:

> (a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use—It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof.

43 U.S.C. § 1311(a).

Hence, § 2105(e) does not reserve states' rights to assert title to abandoned shipwrecks independent from any transfer of title from the federal government through the ASA.

The dual structure of § 2106, which provides for the adjudication of ownership claims to wrecks either under the ASA or the traditional maritime law, contains an "implicit intent to preempt state law."

The overall purpose of the ASA also "implicitly contains" a Congressional intent to preempt state law. The legislative history of the ASA indicates that uniformity in the adjudication of ownership rights to shipwrecks was a primary goal of the statute.

The central issue underlying the ASA was the ownership and the authority to manage abandoned shipwrecks on state lands. Before its enactment, states claimed title to and regulatory authority over abandoned historic shipwrecks. However, federal admiralty courts also claimed jurisdiction over them, creating confusion over ownership and in some cases resulting in inadequate protection of historic artifacts. By

enacting the ASA, Congress sought to clarify that situation by asserting federal ownership over certain shipwrecks and then transferring title to the states for administration, management, and regulation. H.R. REP. No. 100-514 (I), at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 366. Congress enacted the ASA precisely because statutes such as CPRC § 6313 were producing vastly different and erroneous results from state to state regarding the ownership of abandoned shipwrecks found in state waters. If California is permitted to assert ownership over THE BROTHER JONATHAN through its own statutory grant, it will destroy any semblance of uniformity created by the ASA. Adjudication regarding the ownership of abandoned shipwrecks will regress to the same confusing and nonuniform condition that existed prior to the creation of the ASA. Since the purpose of the ASA was to create uniformity among *fora* regarding the adjudication of ownership rights to abandoned shipwrecks, it is clear that Congress intended that state statutes such as CPRC § 6313 would be preempted by the federal statute.

In addition to the clear statement of federal preemption in the structure and purpose of the ASA, CPRC § 6313 also directly conflicts with the federal statute. The California law purports to grant the state title over "all abandoned shipwrecks, archeological sites and historic resources," a much broader class of wrecks than contemplated by the ASA. *See* CAL. PUB. RES. CODE § 6313. In addition, the California statute only attaches the requirement of eligibility for inclusion in the National Register of Historic Places to the categories of archeological sites and historic resources, but not to abandoned shipwrecks. *Id.* § 6313(c). Rather, the California statute states that any shipwreck that has been in state waters for more than 50 years will be defined as historically significant, regardless of whether such wrecks are abandoned or are claimed by identifiable and good faith owners. *Id.* Thus, the California statute includes a much greater number of shipwrecks over which the state may assert title.

Application of CPRC § 6313 would also conflict directly with Congressional intent to preserve the traditional application of the maritime law of salvage or finds to wrecks which do not meet the requirements of the ASA. Section 2106(b) states that the ASA will not "change the laws of the United States relating to shipwrecks, other than those to which this chapter applies." 43 U.S.C. § 2106(b). By enacting the ASA, Congress therefore intended to carve out a narrow exception to the traditional maritime law which was to be limited to a specific number and class of wrecks. The CPRC, on the other hand, would expand the number of wrecks exempt from traditional maritime law well past the class conceptualized by the ASA.

CPRC § 6313 also conflicts with the federal statute because it omits the federal government from the chain of title to abandoned shipwrecks. The two-step process of the ASA which vests title in the federal government and then requires the federal government to transfer title to the states confirms the pivotal role of the federal government in granting the authority to manage and regulate historically significant shipwrecks to the states. The California statute therefore conflicts with the ASA because it purports to vest the original title of the wrecks in the State of California, while the ASA stipulates that the original title to these very same wrecks be vested in the federal government prior to being transferred to the states.

Finally, Congress intended that the ASA occupy the legislative field regarding the management of shipwrecks found in state waters. The language of § 2106 directs the courts to two procedures by which ownership may be determined: one under the ASA and the other under the traditional rules of maritime law. The State may not propose other alternative theories in order to adjudicate its claim to a wreck. The primary goal of uniformity among *fora* indicates that Congress intended to create a complete and all-encompassing system to adjudicate the ownership rights in abandoned wrecks found in state waters, and that any additional state legislation regard-

ing the same matter would be superfluous and thus preempted.

II. FEDERAL MARITIME LAW APPLIES TO THE DISPOSITION OF THE *RES*

Both the express statutory language and the legislative history of the ASA indicate that in order for a shipwreck to be abandoned, it must "have been deserted" and the owner must have "relinquished ownership rights with no retention." 43 U.S.C. § 2101(b); *see also* S. REP. NO. 241, at 5 (1987) (clarifying abandonment).[7] With respect to shipwrecks covered by the ASA, Congress is assumed to use the term "abandonment" to include centuries of admiralty legal practice. *See Morissette v. United States*, 342 U.S. 246, 263 (1952); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31 (1990). The decision below is in conformity with the Abandoned Shipwreck Act Guidelines promulgated by the Department of the Interior[8] and with the maritime law which requires clear and convincing evidence of abandonment when an owner appears.[9] The precepts of the law of salvage were properly applied to the wreck of THE BROTHER JONATHAN by the courts below.

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[7] Initial versions of this legislation would have included any shipwreck over 100 years of age as historic and left the determination of abandonment to the Secretary of the Interior. *See* H.R. 132, 97th Cong. (1981) (introduced by Mr. Bennett on January 5, 1981). This approach was rejected in the final legislation which left the determination of abandonment to the courts.

[8] "When the owner of a sunken vessel is paid the full value of the vessel (such as receiving payment from an insurance underwriter) the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner." 55 Fed. Reg. 50,116, 120-21 (1990).

[9] This is not to say that abandonment may never be inferred. The lower court acknowledges that abandonment may be inferred when no owner exists or comes forward to assert a claim.

A. Admiralty Courts Are Uniform In Their Application Of The Law Of Salvage And The Law Of Finds

There is no conflict among the United States Courts of Appeals regarding application of the law of salvage and the law of finds. Admiralty courts have been uniform in their application of these laws. The Ninth Circuit's opinion is consistent with all other courts of appeals in applying the law of salvage to property in which an owner asserts a claim; those courts applied the law of finds only to unclaimed property. Where the law of salvage provides an adequate remedy for the disposition of sunken property, salvage concepts and proceedings are applied. *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 556 (S.D. Fla. 1982).

> [A]dmiralty has historically disfavored the law of finds, preferring instead the distinct policies of the law of salvage.

Hener v. United States, 525 F. Supp. 350, 355 (S.D.N.Y. 1981). The law of salvage applies in all but the most extraordinary circumstances. *Id.*; *see also Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 459 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993).

When the owner comes forward and makes an appearance, all courts have uniformly applied the law of salvage. *Hener*, 525 F.Supp. at 358; THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 514 (1st ed. 1987). The general rule requires that the law of finds is applied only "in extreme cases where the property is wholly derelict and *affirmatively* abandoned by the owners and underwriters." *Brady v. S.S. AFRICAN QUEEN*, 179 F. Supp. 321, 324 (E.D. Va. 1960) (emphasis added); *see also Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the S.B. "Lady Elgin"*, 755 F. Supp. 213, 214 (N.D. Ill. 1990), *amended by* No. 89C6501, 1991 WL 2536 (N.D. Ill. Jan. 4, 1991). A finding of

affirmative abandonment is a prerequisite to awarding title to a salvor when an owner is present.

The law of finds, under which a salvor may gain title, is an exception to the traditional application of the law of salvage and has been applied where no owner has come forward and where no owner is likely to do so. *Commonwealth v. Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549, 551 (Mass. 1988); *see also Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) (existence of owner was a fiction); *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 556 F. Supp. 1319, 1334 (S.D. Fla. 1983) (vessel indisputably abandoned; owner not in existence).

The courts have awarded title to salvaged property to the salvor only in cases where no claim of ownership was asserted by the owner or where there has been an affirmative abandonment. In some cases, the owners no longer existed, and their existence was deemed "a fiction."[10] The salvor was awarded title so as to avoid the administrative inconvenience of a salvage award proceeding and sale.

Through the rules of salvage, admiralty courts have been able to provide an equitable means of balancing the individual rights of the salvor with the rights of the owner of salvaged property. By precedents that have served the maritime industry well for centuries, the law imposes a lien on the salvaged property to protect the claim of the salvor and requires the salvor to act as a fiduciary in protecting the property for the owner. The law of finds has only been applied to resolve the problem faced when no owner can be found or the owner has affirmatively repudiated title to the property.

[10] For example, no owner asserted any claim to the S.S. REPUBLIC. *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987). In *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981) (*Treasure Salvors III*), *on remand*, 546 F. Supp. 919 (S.D. Fla. 1981), it was *stipulated* that the vessel was abandoned and no owner appeared.

International uniformity in admiralty and marine insurance matters is essential to maritime commerce. In England, as here, the rule is that no abandonment occurs unless there is some overt act which clearly constitutes abandonment.[11] The High Court of Australia and others have taken the same position.[12] The opinion below is in complete conformity with national and international admiralty practice.

B. The Courts Below Correctly Ruled That THE BROTHER JONATHAN Was Not Abandoned

The concept of abandonment affects all shipwreck cases whether a court applies statutory or common law principles of maritime law. *See, e.g.*, 3A BENEDICT ON ADMIRALTY § 133 (7th ed. 1991). Likewise, the definition of abandonment, and how it is applied by a court in an *in rem* proceeding to the facts of a particular shipwreck, determine the ownership rights in the vessel and its cargo. *Id.* Whether a vessel and its cargo are abandoned is the initial question which must be answered in order for a court to correctly apply the law of salvage[13] or the law of finds,[14] or in cases in which a shipwreck

[11] "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business." *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493 (1924).

[12] In *Robinson v. Western Australian Museum*, 16 A.L.R. 623 (1977) (Austl.), the original owner retained title to the GILT DRAGON which sank in 1656. *See id.* at 647, 648, 654, 663, 671, 673-74; *see also Simon v. Taylor*, [1975] 2 Lloyd's Rep. 338 (Sing. Ct. 1974).

[13] The law of salvage applies to shipwrecks that have not been expressly abandoned by their owners. *Columbus-America*, 974 F.2d at 459; *Marex International, Inc. v. Unidentified, Wreck and Abandoned Vessel*, 952 F. Supp. 825, 828 (S.D. Ga. 1997). Salvage law specifies the circumstances under which a party may be said to have acquired, not title, but the right to take possession of the property until proper compensation has been paid. *Columbus-America*, 974 F.2d at 460.

[14] The law of finds, which is epitomized in the rule of "finders keepers, losers weepers," applies when a shipwreck has been abandoned by its owner. *Martha's Vineyard*, 833 F.2d at 1065; *Treasure Salvors, Inc.*

is located on the submerged lands of a state, the ASA.[15] Since the issue of abandonment is central to every shipwreck case, consistency in its application by the courts is vitally important to all parties affected by maritime law.

In holding that THE BROTHER JONATHAN was not abandoned, the Ninth Circuit properly applied the definition of abandonment and acknowledged the presumption in maritime law that, when either an owner or his successor in interest appears in an *in rem* proceeding, an owner's interest[16] in the shipwreck or its cargo may be extinguished only by producing strong evidence of the owner's intent to abandon. *See Columbus-America*, 974 F.2d at 462; *Zych*, 755 F. Supp. at 216; *cf. Fairport International Exploration, Inc. v. Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1081 (6th Cir. 1997). Under established principles of maritime law, abandonment means "the voluntary relinquishment of one's rights in property by an express or implied act of leaving or deserting the property without hope of

v. Unidentified Wreck and Abandoned Sailing Vessel, 569 F.2d 330, 336-37 (5th Cir. 1978); *Marex International*, 952 F. Supp. at 828.

15 43 U.S.C. §§ 2101 *et seq.* The ASA does not define the term "abandonment". However, section 2106(b) states that:

> This chapter shall not change the laws of the United States relating to shipwrecks, other than those to which this chapter applies.

43 U.S.C. § 2106(b). It is therefore evident that Congress intended that courts apply the traditional definition of abandonment that has evolved under maritime law.

16 In most salvage cases involving historic shipwrecks, the original owner is no longer living. Nevertheless, a subrogee or assignee of the original owner's interests has the same rights in the property as the original owners. *See Columbus-America*, 974 F.2d at 462 n.3. Moreover, the ASA guidelines specify that "[w]hen the owner of a sunken vessel is paid the full value of the vessel (such as receiving payment from an insurance underwriter) the shipwreck is not considered to be abandoned. In such cases, title to the wrecked vessel is passed to the party who paid the owner." *Abandoned Shipwrecked Act Guidelines*, 55 Fed. Reg. 50,120-21 (1990).

recovering it and without the intention of returning to it." *Columbus-America*, 974 F.2d at 461; *Martha's Vineyard*, 833 F.2d at 1065; *Zych*, 755 F. Supp. at 214; *see also* 3A BENEDICT ON ADMIRALTY §§ 134, 158. Moreover, where an owner's interest is represented in an *in rem* proceeding, a court's determination of whether a vessel or its cargo are abandoned is shaped by the traditional assumption that the owner did not intend to abandon his property. *See Columbus-America*, 974 F.2d at 462; *Zych*, 755 F. Supp. at 216.

The Petitioner claims that THE BROTHER JONATHAN was abandoned because no one has attempted to salvage the vessel in over 130 years, ignoring the fact that the technology to do so only recently became available. Moreover, the Petitioner asserts that the court below erred in finding that the State failed to demonstrate evidence of the Respondent's[17] affirmative intent to abandon its interests in the cargo of THE BROTHER JONATHAN. In response, the Ninth Circuit correctly adopted the District Court's basis for dismissing the Petitioner's arguments stating:

> Herbert's testimony [the only testimony offered by the State on the issue of abandonment], by itself, *does not provide a sufficient basis for the court to conclude that the owners of THE BROTHER JONATHAN have taken a "clear and unmistakable affirmative act to indicate a purpose to repudiate ownership" in THE BROTHER JONATHAN and its cargo.* In addition, the State has failed to provide sufficient evidence to demonstrate that THE BROTHER JONATHAN has been abandoned due

17 Shortly after THE BROTHER JONATHAN sank, the San Francisco offices of five insurance companies paid the claims of the original owners for the losses. The insurance companies thereby became subrogated owners of the original owners' interest in the lost property. The Respondent thereafter purchased certain insurance companies' subrogated interests in the lost property. The Respondent therefore stands in the shoes of the original owners with respect to their ownership rights in THE BROTHER JONATHAN and its cargo.

> to the lapse of time, or because the owners of the vessel have failed to undertake salvage efforts.

Deep Sea Research, Inc. v. Brother Jonathan, 102 F.3d 379, 388 (9th Cir. 1996), *cert. granted sub nom., California and State Lands Comm'n v. Deep Sea Research, Inc.*, ___ U.S. ___, 117 S.Ct. 2430 (June 9, 1997) (citing *Deep Sea Research, Inc. v. Brother Jonathan*, 883 F. Supp. 1343, 1352 (N.D. Ca. 1995)) (emphasis added).

The distinction that the Petitioner fails to make was not lost on the Ninth Circuit: While abandonment may be inferred from the surrounding facts and circumstances when *no owner* appears in an *in rem* proceeding, there is no authority to do so when an *owner* appears in the proceeding and establishes his ownership. *See Columbus-America*, 974 F.2d at 450 (evidence was insufficient to establish that the subrogated owners abandoned their interests in the cargo); *Zych*, 755 F. Supp. at 213 (cargo was not abandoned even where subrogated owner made no effort to recover wreck); *cf. Bemis v. The RMS Lusitania*, 99 F.3d 1129 (4th Cir. 1996) (contents of vessel was abandoned where no one, including the passengers and their descendants, came forward to file a claim in salvor's action); *Martha's Vineyard*, 833 F.2d at 1059 (abandonment found where no person or firm appeared to assert any overall claim of ownership); *Treasure Salvors, Inc.*, 569 F.2d at 330 (abandonment found where no original owner intervened in the proceeding and where the government of Spain expressed no interest in filing a claim as a successor-owner); *Marex International*, 952 F. Supp. at 825 (wreck was abandoned where neither the owner nor his heirs asserted any claim in the proceedings).

The Ninth Circuit appropriately embraced the distinction between an *in rem* salvage proceeding in which an owner's interests are represented and cases in which they are not. Those distinctions were also clearly stated in *Columbus-America*.[18] The S.S. CENTRAL AMERICA was found in 1987 by Columbus America Discovery Group ("CADG").[19] CADG sought a salvage award or, in the alternative, to be declared the owner of the gold which was known to be on board the CENTRAL AMERICA when she sank. After notice of the discovery was given to the marine underwriters who insured the gold, several of the underwriters filed claims as owners of the cargo. In the litigation which ensued over the ownership of the gold, the lower court erroneously found that the underwriters had abandoned their interest in the cargo because they allegedly destroyed documents evidencing their ownership interests and they failed to search for the wreck after it sank. *Columbus-America Discovery Group v. Unidentified Wreck and Abandoned Sailing Vessel*, 742 F. Supp. 1327 (E.D. Va. 1990), *rev'd sub nom., Columbus-America*, 974 F.2d 450.

In reversing the lower court's finding on abandonment as clearly erroneous, the Fourth Circuit reiterated the legal significance of an owner's interest in property when determining whether the property has been abandoned. The Fourth Circuit stated:

> [W]hen sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the law of salvage over the law of finds. Finds law should be applied, however, in situations where the previous owners are found to have abandoned their property. Such abandonment must be proved by clear and convincing evidence, though, such as an owner's express declaration abandoning title. Should the

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[18] While the ASA was not implicated in *Columbus-America* because the shipwreck was located outside the territorial waters of the United States, the considerations to determine whether a vessel or its cargo are abandoned apply with equal force to THE BROTHER JONATHAN.

[19] While other salvors claimed that they found the S.S. CENTRAL AMERICA, the United States District Court for the Eastern District of Virginia awarded exclusive salvage rights to CADG.

property encompass an ancient and longlost shipwreck, a court may infer an abandonment. *Such an inference would be improper, though, should a previous owner appear and assert his ownership interest*; . . .

Columbus-America, 974 F.2d at 464-65 (emphasis added).

Like the Fourth Circuit, the Ninth Circuit correctly applied the fundamental maxim of the law, that an owner's right to private property remains sacred. *See Stanley v. Colt*, 72 U.S. (5 Wall.) 119 (1866). Consistent with the traditional notion that ownership rights in property should not easily be abandoned, the Ninth Circuit appropriately required the Petitioner to provide convincing evidence that THE BROTHER JONATHAN had been abandoned in order to divest the Respondent, an identifiable owner, of its property rights in the wreck. The court below correctly held that when an owner claims long-lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment and such must be proved by clear and convincing evidence.

A fundamental maxim of a free government is that the right of private property remains sacred. *Stanley*, 72 U.S. at 119. Ownership is the collection of rights to use and enjoy property. BLACK'S LAW DICTIONARY 1106 (6th ed. 1990). Abandonment is the repudiation of ownership. *Treasure Salvors, Inc.*, 458 U.S. at 677 n.8. There must be clear and convincing evidence of abandonment in order to deprive an owner of his rights. There is a strong natural presumption that property is not abandoned and the party alleging abandonment must produce clear evidence of the owner's intent to abandon property. *Wilson v. Colorado Mining Co.*, 227 F. 721, 725 (8th Cir. 1915); *accord United States v. Robinson*, 430 F.2d 1141, 1143 (6th Cir. 1970) (party seeking to establish abandonment has an "especially heavy burden"); SCHOENBAUM, *supra*, at 512. Abandonment must be voluntary and involves a positive intention to part with ownership. *Hoelzer v. City of Stamford*, 722 F. Supp. 1106, 1111 (S.D.N.Y. 1989), *aff'd*, 933 F.2d 1131 (2d Cir. 1991). While abandonment may be inferred

from the surrounding facts and circumstances when no owner appears in an *in rem* proceeding, there is no authority to do so when an owner appears in the proceeding and establishes his ownership, absent a showing of affirmative abandonment.

To ask this Court to impose a judicial statute of limitations on ownership is unthinkable. But that is what Petitioner seeks. A claim against a third party, which can be forfeited by inaction, may not be confused with ownership, which can only be lost by voluntary relinquishment. Ownership is not a claim against a third party which terminates if it is not exercised. It is a right lost only by clear and express renunciation.

C. Uniform Administration Of The *Res* Is Proper

The courts below properly permitted the salvor to administer the entire *res* in the interest of orderly administration of the wreck site and proper conservation of artifacts. Maritime salvage law has afforded admiralty courts with broad discretion in the supervision of the salvage of maritime properties. This broad discretion is consistent with and grounded in the equitable principles which guide the law of salvage.

Admiralty courts have responded to the growing need to supervise the salvage of historic shipwrecks by expanding the considerations to be taken into account in setting a salvage award. Historic preservation of shipwrecks, especially those not subject to ASA, such as THE BROTHER JONATHAN and the CENTRAL AMERICA, is best encouraged by the approach of the Fourth Circuit which specifically listed the care taken by the salvor in preserving historical material as a factor to be considered in determining the size of the salvage award. In treasure salvage cases, the extent to which the historical values of the wreck and of the artifacts are preserved for the public good is a factor to be considered in setting the salvage award. Through its equitable powers, an admiralty court applying the law of salvage may reward such efforts. The interests of uniformity in admiralty law, of the public, of

the maritime community, and of historic preservation of shipwrecks are well served by this approach.

The courts below properly exercised their equitable powers in permitting the uniform administration of the *res* by the salvor. The decision below is entirely consistent with the decision of the Fourth Circuit with respect to the CENTRAL AMERICA. In that *in rem* salvage award proceeding, the insured commercial cargo was not abandoned, whereas the vessel itself and certain artifacts and gold belonging to passengers were held to be abandoned. The salvor nevertheless was granted salvage rights over the entire wreck site and acted as substitute custodian of recovered articles for the court. The decision of the courts below to permit the uniform administration of the wreck site of THE BROTHER JONATHAN comports with traditional maritime law and is fully justified by the facts in this case. The alternative of competing salvage operations at such a site was properly rejected. The decision was a proper exercise of the court's equitable powers, particularly in view of the court's continuing jurisdiction over the salvage efforts and proceedings. Admiralty courts must remain free to administer recovery of sunken properties according to these venerable traditions so that the changing needs and goals of salvage efforts may be met consistently.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the decision of the court below is correct and should be affirmed.

Respectfully submitted,

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